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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1011

FRED WALLACE,

Petitioner,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

LEAH B. MORRIS, HOLLIS B. MORRIS, HERMAN TRENT and FRANK BROWN,

Petitioners,

—v.—

COMMONWEALTH OF VIRGINIA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioners pray that this Court grant rehearing of its decision of June 20, 1966, affirming *per curiam* the judgments below on authority of its opinion in *City of Greenwood* v. *Peacock,* 34 U. S. L. Week 4572 (U. S., June 20, 1966). By the present petition, petitioners respectfully ask rehearing of the questions of construction of the civil rights

removal statute, 28 U. S. C. §1443 (1964), decided herein and in the majority opinion in the *Peacock* case, and assign the following reasons.

REASONS FOR GRANTING REHEARING

I.

The Questions Are of Surpassing Importance.

Petitioners do not lightly ask reconsideration of issues of law determined by this Court in painstaking and comprehensive opinions following plenary briefing and argument. But the decision in *Peacock* and companion cases is one of the most grievous setbacks to the practical enforcement of federal equal civil rights suffered in this century. It holds that peaceful advocates of civil rights, subjected to "an outrageous denial of their federal rights" by "being prosecuted on baseless charges solely because of their race," 34 U. S. L. Week at 4578, have no effective remedy by removal of those baseless prosecutions to the federal district courts for timely and decisive dismissal. Rather they are remitted to the pains, perils and prolongations of litigation in the state courts—litigation which in the Mississippi Freedom Rider cases alone required delay of four years and expenditure of many thousands of dollars before the vindication in this Court, on direct review of state criminal convictions, of plain and callous deprivations of fundamental constitutional rights. *Thomas* v. *Mississippi*, 380 U. S. 524 (1965).

By this decision, only one narrow right among the many which Congress has attempted to protect in fulfillment of the promises made to the American Negro by the Four-

teenth and Fifteenth Amendments—the right of equal public accommodations assured by Title II of the Civil Rights Act of 1964—is to be effectively exercised free of the stifling threat of repressive state prosecutions. *Georgia* v. *Rachel*, 34 U. S. L. Week 4563 (U. S., June 20, 1966). Citizens seeking to enjoy or advocate other precious rights—rights to a desegregated education, to voting and employment without racial discrimination, even to equal accommodation in publicly-owned facilities not described in Title II, e.g., courthouses—are left to the vicissitudes of the state criminal process.

Rehearing is appropriate when a matter of this importance is decided by a close division of the Court. Rehearing is the more appropriate in these civil rights removal cases for an additional reason. At the time of briefing and argument of *Peacock* and *Rachel* and of preparation of *certiorari* petitions in this and other cases, counsel could not fairly have addressed argument to the specific considerations which later emerged as dispositive of the Court's decision. Confronted by a statute having an obscure text, a muddy history, a broad range of alternative plausible readings and no authoritative construction by this Court for sixty years, argument was necessarily dispersed and unfocused. Only upon publication of the Court's opinions have the critical matters of judgment persuasive to a majority of the Court become apparent.

II.

The Grounds of the Decision Are Mistaken.

The prevailing *Peacock* opinion makes clear that neither *stare decisis* nor the technicalities of statutory language or history controlled the result. Petitioners share this view. The legalistic arguments supporting broader or narrower constructions of §1443 have been fully canvassed in the documents before the Court in these several cases and will not be repeated here. These arguments equally support the majority or dissenting views in *Peacock.*

The considerations dispositive to a majority of the Court appear to have been threefold: (A) that ample construction of §1443 would unduly burden the lower federal courts; (B) that leaving prosecutions "on baseless charges solely because of . . . race" in the state courts would not be unduly destructive of federal rights; and (C) that, in any event, other federal remedies would be available to preserve those rights.

A. Burden on the Federal Courts

In practice, removal litigation has not burdened the lower federal courts. Petitioners invite this Court's attention to, for example, the several removal dispositions made in the United States District Court for the Middle District of Alabama, where District Judge Frank M. Johnson, Jr. gave fair and scrupulous attention to the dictates of the Fifth Circuit's *Peacock* opinion during the year prior to its reversal by this Court. The Middle District has been a vitally active center of civil rights contention throughout the period, yet removal hearings were invariably processed with efficiency and dispatch. In a number of cases,

the removants' federal contentions were found unproved and the cases remanded. *Forman* v. *City of Montgomery,* 245 F. Supp. 17 (M. D. Ala. 1965), aff'd, 355 F. 2d 930 (5th Cir. 1966), cert. denied, 34 U. S. L. Week 3430 (U. S., June 20, 1966); *Johnson* v. *City of Montgomery,* 245 F. Supp. 25 (M. D. Ala. 1966); *Crenshaw County Board* v. *Barnett,* 251 F. Supp. 917 (M. D. Ala. 1966); *Cochran* v. *City of Eufaula,* 251 F. Supp. 981 (M. D. Ala. 1966). In other cases, removants' claims that their prosecutions were maintained to harass them for federally protected activity were sustained and charges expeditiously dismissed. *McMeans* v. *Mayor's Court,* 247 F. Supp. 606 (M. D. Ala. 1965); *In re Wright,* 251 F. Supp. 880 (M. D. Ala. 1965); *Hughley* v. *City of Opelika,* 251 F. Supp. 566 (M. D. Ala. 1965); *Smith* v. *City of Montgomery,* 251 F. Supp. 849 (M. D. Ala. 1966). In this district and others the process worked smoothly. In the Southern District of Alabama, to take another example, nearly 3,000 harassment prosecutions arising out of the Selma demonstrations in January, 1965 were terminated within three months. *Alabama* v. *Boynton,* S. D. Ala., C. A. No. 3560-65, April 16, 1965. This performance may profitably be compared with the record in the Mississippi Freedom Rider cases mentioned previously.

In its *Peacock* opinion, this Court noted the Administrative Office figure that 1079 criminal cases were removed to federal district courts in the Fifth Circuit alone during fiscal 1965. 34 U. S. L. Week at 4579. Petitioners invite the Court's reconsideration of the significance of that figure. In the first place, it is obviously inflated by the now-discarded practice of many federal district court judges of requiring separate removal petitions and numbers for each removal petitioner, even in cases of hundreds of ar-

rests at a single demonstration, disposable by a single jurisdictional hearing. See *Lefton* v. *City of Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964); *Alexander* v. *Cox*, 348 F. 2d 854 (5th Cir. 1965). Second, the statistic does not disclose the number of removed cases which would be found improperly removed even under the minority construction of §1443 in *Peacock*, cf. *People* v. *Berger*, 239 F. Supp. 219 (S. D. N. Y. 1965). It thus does not support the majority's implication that the minority's construction, urged by petitioners, would flood the district courts of the Fifth Circuit with more than a thousand cases; that number plainly is the product only of the absence of *any* construction of §1443 by this Court during sixty years. Third, the statistic does not purport to reveal the burden imposed on the federal courts by requiring petitioners who might properly have removed under that minority construction to resort to this Court for *certiorari* or to federal district courts for post-conviction habeas corpus for vindication of their rights. Fourth, the statistic does not reveal the number of cases properly removed under *Rachel*.

B. Destruction of Federal Rights by State Court Trial

The majority opinion in *Peacock* supports by exemplary citation of *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965), its judgment that Supreme Court review of state criminal convictions provides ample protection against racial harassment conducted through the state criminal process. The citation has a bitter irony, although its ironic quality does not arise from the uniqueness of Shuttlesworth's case. Reverend Shuttlesworth has been badgered by more than a dozen criminal prosecutions in Birmingham since the beginning of civil rights activity there. The Court's opinion cited above marked his fifth appearance here. See *Shuttlesworth* v. *City of Birmingham*, 368 U. S.

959 (1962); *In re Shuttlesworth,* 369 U. S. 35 (1962); *Shuttlesworth* v. *City of Birmingham,* 373 U. S. 262 (1963); *Shuttlesworth* v. *City of Birmingham,* 376 U. S. 339 (1964). And following reversal of his conviction in 382 U. S., after 3½ years of litigation and the expenditure of many thousands of dollars in unrecoverable court expenses, he has been subjected to reprosecution on the charge there considered, for violation of Birmingham City Code §1142 as amended. In order to ease the harassment, the case was removed to federal court but, on June 28, 1966 was remanded to state court on authority of *Peacock. City of Birmingham* v. *Shuttlesworth,* N. D. Ala. Cr. 66-203. See also *Cox* v. *Louisiana,* 348 F. 2d 750 (5th Cir. 1965), describing the reprosecution of Cox following *Cox* v. *Louisiana,* 379 U. S. 559, 575 (1965).

The *Peacock* opinion poses the right question when it asks whether "the historic practice of holding state criminal trials in state courts—with power of ultimate review of any federal questions in this Court—[has] been such a failure that the relationship of the state and federal courts should now be revolutionized." 34 U. S. L. Week at 4580. *In the limited sphere of state prosecutions for conduct protected by federal civil rights law,* petitioners submit the evidence is overwhelming that the answer to that question is, yes. See the documented discussion in *Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 U. Pa. L. Rev. 793, 794-799, 836-842, 861-862 (1965). A point of vital significance is that the federal circuit judges of the Court of Appeals for the Fifth Circuit—having had long and discouraging experience in such matters—concluded in their *Peacock*

decision that the answer to the question was, yes. So did federal district judges in the Fifth Circuit. See pp. 4-5, *supra*. The same conclusion has been reached in every authoritative recent study of the problem. See UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT 57-83, 130-135, 175 (1965); SPECIAL COMMITTEE ON CIVIL RIGHTS UNDER LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PROPOSAL FOR A FEDERAL CIVIL RIGHTS PROCEDURE ACT (1966); COUNCIL'S REPORT AND RECOMMENDATIONS TO THE CONFERENCE (White House Conference "To Fulfill These Rights," June 1-2, 1966) 80-81, 87-88 (1966). Surely, if the need for a protective federal jurisdiction in this area has not been demonstrated, one may despair of justifying in any case the existence and necessity of the extensive jurisdiction of the lower federal courts.

C. Other Federal Remedies

Promising on paper, the other federal remedies enumerated in *Peacock* for the relief of persons in petitioners' situation prove illusory in practice. Review by this Court on direct appeal of state criminal convictions has already been discussed. Federal criminal prosecutions of, and civil damage actions against, offending state officials offer none of the protection sought by removal. It is quite implausible to suppose that the resources of the Civil Rights Division of the Department of Justice are ample to meet unconstitutional state criminal prosecutions with corresponding federal criminal prosecutions; even if they were, it is more than dubious that harmonious federal-state relations would be better served by this course. In any event, southern juries and the *scienter* requirements of 18 U. S. C. §§241, 242 (1964) combine to deprive the fed-

eral criminal remedy of efficacy to deal with common civil rights situations where the line of federal constitutional protection is far from clear. See *Edwards* v. *South Carolina,* 372 U. S. 229 (1963). Southern juries are the arbiters of justice in damage actions as well. Although *Monroe* v. *Pape,* 365 U. S. 167 (1961), was decided prior to *Mapp* v. *Ohio,* 367 U. S. 643 (1961), *Mapp* nevertheless rejected the adequacy of redress by civil money actions. This conclusion is no less appropriate here for virtually identical reasons. See also, *Bauers* v. *Heisel,* —— F. 2d —— (3rd Cir. 1966) (34 U. S. L. Week 2664), where it was held that a state prosecutor was immune to suit under the federal civil rights statute, 42 U. S. C. §1983.

The federal injunctive remedy allowed in *Dombrowski* v. *Pfister,* 380 U. S. 479 (1965), would, of course, be quite ample if it could be timely had. But this Court has already clouded *Dombrowski.* See *Wells* v. *Reynolds,* 382 U. S. 39 (1965). Petitioners do not understand the majority in *Peacock* to hold relief by injunction available in all cases within the scope of civil rights removal under the construction of §1443 which petitioners urge. But even were this so, one could not expect federal district judges, in the exercise of their discretion over injunctive process, to allow that more intrusive remedy in situations which this Court has been unwilling to rectify by removal.

Finally, there remains federal habeas corpus. 28 U. S. C. §2241(c)(3) (1964). Postconviction habeas within the principles of *Townsend* v. *Sain,* 372 U. S. 293 (1963), has all the defects of direct review, plus a further delay of some months or years. Sentences in civil rights cases are burdensome, but they are not so extended as to make postconviction habeas a realistic remedy. See the simple

device employed by the prosecution in *Dresner* v. *Stoutamire,* 5th Cir., No. 21802, August 5, 1964, to emasculate federal jurisdiction, described in *Amsterdam, supra,* at 841 n. 192. Pretrial federal habeas corpus might in many instances be an effective remedy, and the terms and history of that statute seem rather plainly to make it available to state court defendants in the position of petitioners and the removants in *Peacock. Id.,* at 908. However, this Court's denial of *certiorari* in *Hillegas* v. *Sams,* 383 U. S. 928 (1966), has aborted that method of federal judicial relief. The Court did not reach the merits of the case, but its refusal to review has meant that the stays required to bring another such test habeas corpus proceeding here are unavailable. In habeas corpus as well as removal, federal courts are now disempowered to afford effective protection for violation of federal equal civil rights.

CONCLUSION

For the foregoing reasons, petitioners request that the Court grant rehearing and reverse the judgments below.

Respectfully submitted,

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CERTIFICATE

I, CHARLES STEPHEN RALSTON, a member of the Bar of this Court and counsel for petitioners herein, hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for purposes of delay.

Attorney for Petitioners

END